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Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980
No.____

LINDA M. LIBERI TONER,
Petitioner,

-vs-

COMMISSIONER OF INTERNAL REVENUE
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT A. DESTRO
Catholic League for Religious and Civil Rights
1100 West Wells Street
Milwaukee, WI 53233
(414) 289-0170

MARY ANN HAGAN
809 Three Penn Center Plaza
Philadelphia, PA 19102
(215) 568-4062

MARCUS SCHOENFELD
Villanova Law School
Villanova, PA 19085
(215) 645-7437

Counsel for Petitioner

QUESTION PRESENTED

Does 42 U.S.C §1988 (1976) authorize an award of reasonable attorney fees to a taxpayer prevailing on the merits of a challenge to the Tax Court's affirmance of the Commissioner's notice of deficiency in a case where the Court of Appeals found:

1) that the Commissioner's position was "inconsistent with the language and structure of the Regulations", and

2) that the opinion of the concurring judges making up a majority in the Tax Court "[was] directly contrary to the language of the Regulations"?

PARTIES

There are no parties to this action other than those named in the caption.

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QUESTION PRESENTED

Does 42 U.S.C. §1988 (1976) authorize an award of reasonable attorney fees to a taxpayer prevailing on the merits of a challenge to the Tax Court's affirmance of the Commissioner's notice of deficiency in a case where the Court of Appeals found:

1) that the Commissioner's position was "inconsistent with the language and structure of the Regulations", and

2) that the opinion of the concurring judges making up a majority in the Tax Court "[was] directly contrary to the language of the Regulations"?

PARTIES

There are no parties to this action other than those named in the caption.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Third Circuit are reported at --F.2d--; 80-2 U.S.T.C. ¶9653 (3rd Cir. 1980) (attorney's fees) (see Appendix), and 623 F.2d 315 (3rd Cir. 1980) (tax issue). The opinion of the United States Tax Court is reported at 71 T.C. 772 (1979).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit on the attorney's fees question was entered on September 3, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1988

> ...[I]n any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, ...the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Internal Revenue Code §6212(a)

> (a) In general. If the Secretary determines that there is a deficiency, in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43 or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

Internal Revenue Code §6213

> (a) Time for filing petition and restriction on assessment. Within 90 days or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43 or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.
>
> * * *
>
> (c) Failure to file petition. If the taxpayer does not file a petition with the Tax Court within the

time prescribed in subsection (a), the deficiency notice of which as been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

* * *

STATEMENT OF THE CASE

Petitioner filed a timely Federal income tax return for 1973 and claimed a deduction of $906.28 under section 162 of the Internal Revenue Code for educational expenses incurred in that year. Respondent [hereinafter "the Commissioner"] commenced the instant proceeding when a deficiency notice was sent to her on October 29, 1975. The deficiency notice claimed that Petitioner owed $177.41, due to disallowance of the educational expense deduction she had taken. She sought review of the Commissioner's position by timely petition to the United States Tax Court filed on January 20, 1976, pursuant to section 6213 of the Internal Revenue Code.

The case was tried before the Honorable Judge Charles R. Simpson in Philadelphia, Pennsylvania on

November 7, 8 and 18, 1977 and decision was entered for the Commissioner. The full Tax Court reviewed the decision and affirmed by a five-tothree-to-seven (5-3-7) margin. Judge Simpson's plurality opinion was joined by four other judges. Each of three concurring judges disagreed with the five judge majority and wrote a separate opinion holding against Petitioner on grounds that the Commissioner did not assert. Each of the seven dissenting judges joined in the two dissenting opinions.

On appeal, the United States Court of Appeals for the Third Circuit unanimously reversed on the grounds relied upon by the dissenting judges below. The Commissioner did not seek review of that holding in this Court. Petitioner filed a motion for attorney fees incurred in the proceedings pursuant to 42 U.S.C. §1988, but the motion was denied and the case now comes before this Court on writ of certiorari seeking review of the Third Circuit's decision holding that it was without authority to award attorney's fees in a case such as the one at bar.

STATEMENT OF FACTS

The Petitioner in the instant appeal is Mrs. Linda Toner, a teacher in a private Philadelphia elementary school which, under Pennsylvania state law, is exempt from state prescribed minimum educational standards. *See* Pa.Stat.Ann. tit. 24 §§12-1201 to -1202, 2732 (Purdon). The minimum education required for elementary school teachers by her employer was a high school diploma, but any teacher without a bachelor's degree was required to earn six hours of college credit each year.

At the time she began teaching, Mrs. Toner had completed two years of college. She was a member of the faculty and had full responsibility for a fifth grade class. In 1972, she took fifteen hours of credit at Villanova University, earned her degree, and deducted her tuition from her 1973 return as a business expense, pursuant to I.R.C. §162(a). The Commissioner disallowed the deduction and filed a notice of

deficiency in the amount of $177.41. The proceedings which occurred thereafter are summarized above. Although the amount of fees in question is not an issue in this petition, it should be noted that the attorney's fees and costs in this proceeding to date will exceed the $177.41 deficiency alleged by the Commissioner, but rejected by the Court of Appeals.

I.

THE DECISION BELOW IS IN IRRECONCILABLE CONFLICT WITH THE PLAIN LANGUAGE OF 42 U.S.C. §1988 AND CASES CONSTRUING THE MEANING OF ITS OPERATIVE LANGUAGE IN OTHER CONTEXTS

A. Introduction

In the decision below, the United States Court of Appeals for the Third Circuit denied petitioner an award of attorney's fees. *Toner v. Commissioner*, *-F.2d-, 80-2 U.S.T.C. ¶9653 (3d Cir. 1980).* In doing so, it decided an important question of federal law in a manner which conflicts with the plain language of 42

U.S.C. §1988, and frustrated a Congressionally enacted plan to provide for discretionary attorney fee awards to taxpayers who are successful in disproving a substantially unjustified claim by the Commissioner for taxes alleged to be due the United States.

Section 1988 permits a court, in its discretion, to award attorney's fees to a prevailing taxpayer "in any civil action or proceeding by or on behalf of the United States... to enforce, or charging a violation of a provision of the United States Internal Revenue Code..." The statutory elements necessary for the court to exercise its discretion and award attorney's fees are that the taxpayer prevail in a civil action or proceeding and that the action or proceeding be brought by or on behalf of the United States to enforce or charge a violation of the United States Internal Revenue Code.

In the case at bar, there can be no doubt that the Petitioner prevailed in a proceeding commenced by the Commissioner to enforce a clearly erroneous interpretation of the United States Internal Revenue Code. When Petitioner timely sought her reasonable attorney's fees pursuant to 42 U.S.C. §1988, however, her petition was denied on the grounds that the "language of section 1988 does not expressly provide for attorney's fees when the government initiates an administrative p ›ceeding," *Toner v. Commissioner, 80-2 U.S.T.C. ¶9653 at 85,158, -F.2d- (3d. Cir. 1980)* [*citing Aleyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 266-68 (1975)*]. The Court also held that a petition to the Tax Court casts the taxpayer seeking review of a deficiency notice as a "plaintiff", *see* 80-2 U.S.T.C. ¶9653 at 85, 158 n. 1, even though the Petitioner was, in fact, an "appellant" in a proceeding begun by the Commissioner which, if not extended by appeal, would terminate in a fixed liability payable to the United States. I.R.C. §6213(c).

Petitioner respectfully submits that, given both the structure of the Internal Revenue Code and the plain meaning of the words of section 1988, the Court of Appeals is in error and that the instant proceeding was initiated by the Commissioner's issuance of an income tax deficiency notice pursuant to section 6212 of the Internal Revenue Code of 1954. Since the unquestioned effect of the notice was to charge Petitioner with a violation of I.R.C. §162(a) for a deduction taken on her 1972 federal income tax return, a petition to the United States Tax Court pursuant to I.R.C. §6213 seeking a ruling that the challenged deduction was proper under I.R.C. §162 merely continued the original proceeding. Had Petitioner failed to seek review within the time permitted, the Commissioner's decision would have become final upon the expiration of the review period, and her liability would have been fixed in accordance with the Commissioner's assessment, I.R.C. §6213(c), thus exposing her to summary action to recover the amount alleged to be due. *See* I.R.C. §§6331 *et. seq.*

Although it was evident that the amount of taxes alleged to be due in this case was small (only $177.41), Petitioner chose to continue the proceeding commenced by the Commissioner by seeking review of the alleged deficiency on the grounds that the Commissioner was ignoring his own Regulations and the clear meaning of the Code. After hearing and review by the full Tax Court, a split decision was entered affirming the Commissioner's position. Five judges upheld the Commissioner's reasoning based on the grounds asserted in the notice; three concurred on grounds not asserted by the Commissioner, *cf.* I.R.C. §6214(a); and seven justices dissented. The result was an 8-7 decision which, in both reasoning and practical effect, flew in the face of the language of the Regulations upon which it was based.

On appeal, the Third Circuit unanimously reversed, holding that none of the grounds relied upon by the Tax Court supported its decision, 623 F.2d at 319, that "the plurality's reading of [the relevant

regulation was] inconsistent with the language and structure of the regulations" *(Id.)*; that construction of the controlling language "wrenche[d]" it out of its proper context, *Id.*; and that the concurring judges' reading of the regulations "[was] directly contrary to the language of [Treas. Regs. 1.162a-5](b)(3)(i)", and a position not even defended by the government on appeal, 623 F.2d at 320.

B. *The Construction of the Operative Language of Section 1988 Below Is in Conflict with Its Plain Language and the Decisions of This and Other Courts Involving the Same Language in Other Contexts*

Since the only question presented in this petition is whether or not 42 U.S.C. §1988 authorizes a discretionary award of attorney's fees to a prevailing taxpayer when the Commissioner commences an administrative proceeding to collect taxes alleged to be due, *see, Aleyeska Pipeline Co. v. Wilderness Society,*

421 U.S. 240 (1975), the only relevant inquiry is whether the decision of the Third Circuit is consistent with decisions of this Court construing the language of the statute and Congressional intent.* Although the Court of Appeals followed the generally established rule that the United States must be a party "plaintiff", *see e.g., Key Buick Co. v. Comm'r, 613 F.2d 1306 (5th Cir. 1980); Kipperman v. Comm'r., 622 F.2d 431 (9th Cir. 1980); Aparacor v. United States, 571 F.2d 552*

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* No questions respecting either the amount of fees involved or the application of guidelines for the proper exercise of that discretion are in issue in this petition. There is no question that the courts have ample guidelines under section 1988 which would control their discretion to grant a fee award should the threshold question of authority be resolved in favor of Petitioner, *see, e.g.*, Senate Report No. 94-1011 at 4-5; House Report No. 94-1558 at 6-7; *Carrion v. Yeshiva University, 532 F.2d 722 (2d Cir. 1976); Richardson v. Hotel Corp. of America, 332 F.Supp. 519 (E.D.La.1971) aff'd., 468 F.2d 951 (5th Cir. 1972); United States Steel Corp. v. United States, 385 F.Supp. 346 (W.D.Pa. 1974)*, and the factual and legal background of this case makes it clear that Petitioner would present a strong case for an award of fees.

(Ct.Cl. 1978). But *cf., In re Slodov 79-1 U.S.T.C. ¶9215 (N.D.Ohio 1979). Contra Levno v. United States, 440 F.Supp. 8 (D.Mont. 1977)* Petitioner submits that its construction of section 1988, ignores the difference between an "action" and a "proceeding" recognized by this Court in other cases, and that it is neither fair, nor consistent with this Court's reading of the statute when applied to civil rights cases. The Court of Appeals' interpretation of the words "civil action or proceeding" assumes that a statute expressly intended to abrogate the *Aleyeska* rule is to have no effect in cases it was clearly intended to cover, *see Aparacor, supra,* 571 F.2d at 558 (Nichols, J. concurring), and it ignores the explanation given by the sponsor of the amended bill after its passage:

> "I inserted the word 'proceeding' in my new amendment specifically to include administrative proceedings or audits so that fees and costs in connection with audits or other I.R.S. agency proceedings could be awarded by a court on application of a prevailing taxpayer. I also included the term 'proceeding' so that it would be clear that in any case involving a disputed tax, the court would be free to award attorney's fees so long as the taxpayer prevailed and

> the court felt the award was appropriate... notwithstanding the formalistic characterization of the taxpayer as plaintiff or defendant or appellant or appellee." 123 Cong. Rec. 5732 (daily ed. January 14, 1977)

According to its sponsor, the taxpayer's designation in the appeal of an I.R.S. determination of deficiency is irrelevant to an award of attorney's fees since the proceeding truly commenced upon the issuance of the deficiency notice. The question presented for review on this petition may, therefore, be restated as asking for a determination of whether a duly enacted statute aimed at abrogating the *Aleyeska Pipeline* rule should be held to "[accomplish] an insignificant result, unworthy of the attention devoted to it by the Congress in debate" *Aparacor, supra,* 571 F.2d at 558, or whether Congress should be taken at its word. *Compare United States v. Menache,* 348 U.S. 528 (1955); *Parker v. United States,* 448 F.2d 793 (10th Cir. 1971).

In *New York Gaslight Club, Inc. v. Carey*, --U.S.--, 100 S.Ct. 2024 (1980), this Court held that Congress' use of the phrase "action or proceeding" in section 1988 indicated intent to subject a losing party to liability for attorney's fees and costs incurred in administrative proceedings. 100 S.Ct. at 2029, and in *Bahen and Wright, Inc. v. Comm'r.*, 176 F.2d 538 (1949), the Fourth Circuit held that:

> "The issuance of the Commissioner's notice of deficiency...is the first formal step in the assessment and collection of an additional tax...We think that these several steps may fairly be regarded as parts of an integral administrative proceeding, and that it cannot be said that the proceeding does not begin until the jurisdiction of the tax court is invoked. The court merely takes the final administrative step as an "independent agency in the executive branch of the government." 176 F.2d at 539-40.

See also Bull v. United States, 295 U.S. 247 (1935); *Bowers v. New York and Albany Lighterage Co.*, 273 U.S. 346, 349 (1927) ("[t]here is nothing in the language or context that indicates an intention to

use 'suit' or 'proceeding' synonomously."); *American Standard Watch Co. v. Comm'r., 229 F.2d 672 (2nd Cir. 1956); Ann C. Field, 32 T.C. 187 (1959) aff'd, 286 F.2d 960 (6th Cir. 1960), cert. den. 366 U.S. 949 (1961). Compare Engel v. United States, 448 F.Supp. 201, 202 (W.D.Pa. 1971)* (taxpayer who pays disputed tax ends adminstrative proceeding). *See generally "The Civil Rights Attorney's Fees Awards Act of 1976, Key Buick and Aparacor: The Availability of Fee Awards to Prevailing Taxpayers and Standards for the Exercise of Judicial Discretion," 31 Tax Lawyer 855 (1978); Note, Court Awarded Attorney's Fees in Tax Litigation: 42 U.S.C. §1988, 126 U.Pa.L.Rev. 1368 (1978); A. Ellentuck, et al., "Attorney's Fees Awards in Tax Litigation Now available to Successful Litigants," Journal of Taxation 157 (March 1977); Malston, In Response to Aleyeska -The Civil Rights Attorney's Fees Act of 1976, 21 St.Louis L.J. 430, 437 (1977).*

These authorities demonstrate that a line of cases exists which squarely conflicts with the cases holding

that the words "civil action or proceeding" have the same meaning and should preclude recovery of attorney's fees. A uniform rule as to the correct construction of the words "civil action or proceeding" as used in section 1988 is needed. Certiorari has been granted in the past due to "need for a uniform rule on a point." *See Commissioner v. Bilder*, 369 U.S. 499, 501 (1962), and Petitioner respectfully submits that granting the writ would be appropriate given the conflict here.

II.

RECENT CONGRESSIONAL ENACTMENTS CONVINCINGLY DEMONSTRATE THAT THE COURT OF APPEALS ERRED IN ITS FINDINGS RESPECTING CONGRESSIONAL INTENT IN ENACTING SECTION 1988

On October 21, 1980, Congress enacted Public Law 96-481, the "Equal Access to Justice Act", amending 28 U.S.C. §2412 and 5 U.S.C. §504, to permit an award of

attorneys fees "to the prevailing party in any civil action by or against the United States or any agency and any official ... acting in his or her official capacity", Pub. L. 96-481 §204(a); or in any "adversary adjudication". Pub. L. 96-481 §203(a). Although the new law does not take effect until October 1, 1981 and would not afford any relief to Petitioner, Pub. L. 96-481 §207, it does make the intent of Congress clear on two points at issue here: 1) 42 U.S.C. §1988 was intended to equalize the relative access to justice for taxpayers subjected to administrative or judicial proceedings when, as here, the government's position is substantially unjustified; and 2) Congress has always intended that by enacting section 1988, it intended to "effectuate a specific and compelling public interest" Senate Rept. 96-253 (July 20, 1979) (96th Congress, 1st Sess.) at 4, and it had the right to expect that the Courts would treat the tax litigation provisions as considerably more than "an insignificant result, unworthy of the attention devoted

to it ... in debate", *see, Aparacor, supra,* 571 F.2d at 558 (Nichols, J. concurring).

In the explanation of the bill in its original form (S.265), the Senate Judiciary Committee declared that:

> The American rule is grounded in the belief that a losing party should not be penalized for merely exercising his or her right to prosecute or defend a lawsuit. Thus, one of the stated purposes of the American rule is not to discourage or deter litigation. However, in many cases, particularly in litigation with the Government, the American rule is in fact having the opposite effect. For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. *See Stanford Daily v. Zurcher,* 366 F.Supp. 18 (N.D. Calif. 1973). When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.

* * *

. . . The bill rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law. An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate, or it may provide a vehicle for developing or announcing more precise rules. The bill thus recognizes that the expense of correcting the error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of Federal authority. Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights. Thus, at the present time, the Government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful

> presentation and consideration of opposing views. . . . Senate Rept. 96-253, *supra*, at 5.

The statement of purpose of the new Act includes "insur[ing] the applicability in actions by or against the United States of . . . the statutory exceptions to the 'American rule' respecting the award of attorneys fees, and shows that Congress felt it necessary to remedy inherently unfair situations like those presented here in cases not already covered by statutory exceptions to the "American rule" like section 1988. Petitioner respectfully asks, therefore, that this Court grant the petition and reverse the holding of the Third Circuit insofar as it relies on what has now been shown to be clearly erroneous judicial reading of Congressional intent.

CONCLUSION

Petitioner, an elementary school teacher with a potential tax liability of only $177.41, challenged the Commissioner and proved that his position was "inconsistent with the language and structure of the regulations", *Toner* v. *Commissioner*, 623 F.2d at 320. She submits that she is clearly within the category of taxpayers section 1988 was intended to protect, and that by challenging the Commissioner she fulfilled the role of a "private attorney general" who has, by her tenacity, "provide[d] a concrete, adversarial test of Government regulation, and [has] thereby insure[d] the legitimacy and fairness of the law." Senate Rept. 96-253, *supra*, at 5. Congress itself has recognized that "[w]here parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights", *Id.* and since the decision below rests upon an erroneous reading of both Congressional intent and this Court's prior

rulings respecting the terms "action" and "proceeding", the petition should be granted, and the decision below should be summarily reversed.

Respectfully submitted,

Robert A. Destro
Catholic League for Religious and Civil Rights
1100 West Wells Street
Suite 501A
Milwaukee, Wisconsin 53233
(414) 289-0170

Mary Ann Hagan
Suite 809
Three Penn Center Plaza
Philadelphia, Pa. 19102
(215) 568-4062

Marcus Schoenfeld
Villanova Law School
Villanova, Pa. 19085
(215) 645-7437

Attorneys for Petitioner

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2033

LINDA M. LIBERI TONER,
Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

APPEAL FROM THE UNITED STATES TAX COURT
(T.C. Docket No. 0555-76)

On Appellant's Motion for Attorneys' Fees
Submitted Under Third Circuit Rule 12(6)

August 4, 1980

Before: SEITZ, *Chief Judge*, ROSENN, *Circuit Judge*, and SHAPIRO, *District Judge**

(Filed September 3, 1980)

Mary Ann Hagen
Philadelphia, Pa. 19102
Marcus Schoenfeld
Villanova, Pa. 19805
Robert Destro
Milwaukee, Wis. 53233
Counsel for Appellant

M. Carr Ferguson
Assistant Attorney General
Michael L. Paup
William A. Friedlander
Gilbert S. Rothenberg
Attorneys, Tax Division,
Department of Justice,
Washington, D.C. 20530

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* Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

SEITZ, *Chief Judge*.

This is a motion by the appellant, Linda M. Liberi Toner, for attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988 (1976).

I.

In 1973, the appellant claimed a deduction of $906.28 for her 1973 educational expenses. Based on a disallowance of this deduction, the Internal Revenue Service sent her a deficiency notice. She elected not to pay the tax and seek a refund. Instead, she petitioned the Tax Court to contest the deficiency. The full Tax Court found against the appellant. *See Toner v. Commissioner*, 71 T.C. 772 (1979). We reversed the decision of the Tax Court and entered judgment for the appellant. *See Toner v. Commissioner*, No. 79-2033 (3d Cir. June 16, 1980). The appellant then moved for attorneys' fees pursuant to 42 U.S.C. §1988 (1976). The government filed a memorandum in opposition to appellant's motion for attorneys' fees.

II.

Section 1988 permits a court, in its discretion, to award attorneys' fees to a prevailing taxpayer, "in any civil action or proceeding by or on behalf of the United States . . . , to enforce, or charging a violation of, a provision of the United States Internal Revenue Code." 42 U.S.C. §1988 (1976). Although the appellant in the present case initiated the petition in the Tax Court, she offers two arguments for characterizing this case as an action brought "by or on behalf of the United States" within the meaning of the statute, which we will now address.

A.

The appellant first argues that the phrase "civil action or proceeding" in section 1988 was intended to en-

compass administrative proceedings. According to this argument, the government initiated a civil action or proceeding within the meaning of section 1988 when it sent her a deficiency notice. Neither the language of the Act, however, nor its legislative history contemplates such a broad definition of "civil action or proceeding." Awards of attorneys' fees against the United States are prohibited by 28 U.S.C. §2412 (1976) absent specific statutory authorization. We therefore will not imply that attorneys' fees can be assessed against the government, but must find express statutory authorization. *See Aleyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 266-68 (1975). The language of section 1988 does not expressly provide for attorneys' fees when the government initiates an administrative proceeding.

The dominant weight of the legislative history, as expressed in the congressional debates, also supports the conclusion that Congress considered "civil action or proceeding" to mean some form of judicial proceeding as opposed to an administrative action such as the issuance of a deficiency letter. In introducing the amendment to section 1988 that would allow attorneys' fees against the government in certain tax cases (the Allen amendment), Senator Allen explained the effect of the amendment:

> What it does is to add to the civil rights attorneys' fees provision a provision that if the Internal Revenue Service or the U.S. Government *brings a civil action against a taxpayer* to enforce any provision of the Internal Revenue Code, and the Government does not prevail against the taxpayer, *then the court*, in its discretion, just as in other cases, would be entitled to award the taxpayer reasonable attorneys' fees. That is all it does, and I hope the amendment will be agreed to.

122 Cong. Rec. 33,311 (1976) (remarks of Sen. Allen) (emphasis added). Senator Kennedy, in urging passage of the Act remarked that under the Allen amendment:

> *a court would be authorized* to award attorneys' fees *to a taxpayer who is a defendant in a civil action brought by the U.S. Government* to enforce the provisions of the Internal Revenue Code. The usual standard applied in cases where fees are awarded to prevailing defendants would apply here as well — that is, *awards are appropriate where the action initiated by the plaintiff, the Government*, acted in a frivolous or vexatious manner or brought the suit for purposes of harassment.

Id. at 33,312-13 (remarks of Sen. Kennedy) (emphasis added). Representative Drinan, who sponsored the amendment in the House, evidenced a similar understanding:

> The Allen amendment would allow the prevailing party to recover its counsel fees *in any civil action brought by the United States* to enforce the Internal Revenue Code. *It would not apply to actions instituted against the Government by the taxpayer.* Since [the amendment] does not allow the U.S. Government to recover its fees under any circumstances, the effect of the Allen amendment is *to permit prevailing defendants in such cases to recover their attorney fees* if they satisfy the criteria generally applicable under the bill to prevailing defendants. . . .

Id. at 35,122 (remarks of Rep. Drinan) (emphasis added).

The only reference to an administrative proceeding that the appellant has brought to our attention is a remark by Senator Allen several months after the Act was signed into law:

> I inserted the word "proceeding" in my new amendment specifically to include administrative proceedings or audits so that fees and costs in connection with audits or other I.R.S. agency proceedings

> could be awarded by a court on application of a prevailing taxpayer. I also included the term "proceeding" so that it would be clear that in any case involving a disputed tax, the court would be free to award attorney fees so long as the taxpayer prevailed and the court felt that a fee award was appropriate considering all factors in the case and notwithstanding the formalistic characterization of the taxpayer as plaintiff or defendant or as appellant and appellee.

123 Cong. Rec. 1281-82 (1977) (remarks of Sen. Allen). Because these remarks were made after the Act was passed, we must be cautious in relying on them as an expression of congressional intent. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979); *International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corp.*, No. 79-1893 (3d Cir. Aug. 1, 1980). Although this statement directly supports the appellant's contentions, we do not find it to be convincing evidence of congressional intent to include such administrative proceedings within the ambit of section 1988 when it was enacted. Not only was this statement made after the Act was passed, it also differs from Senator Allen's earlier explanation of the amendment on which those Congressmen who approved the amendment relied. We agree with those courts that have rejected this passage as persuasive evidence of congressional intent. *See, e.g., Patzkowski v. United States*, 576 F.2d 134, 136n.2 (8th Cir. 1978); *Aparacor, Inc. v. United States*, 571 F.2d 552, 556-57 (Ct. Cl. 1978) (en banc).

Moreover, acceptance of appellant's contention would mean that each time the government takes administrative action, such as initiating an audit or sending a deficiency letter, it will inevitably be the "initiator" of an action within the meaning of section 1988, and thus subject to an attorneys' fees claim should the taxpayer ultimately prevail. We conclude that if Congress had intended to expose the government to the claims of

prevailing taxpayers for attorneys' fees in practically every case where the government disputes the amount of tax liability, it would have done so explicitly.

We do not retreat from this conclusion because of the argument that unless administrative proceedings are included within the phrase "civil action or proceeding," the word proceeding is effectively eliminated from the statute. On the contrary, when, for example, the Secretary applies to a district court judge under section 7604 of the Internal Revenue Code to enforce a summons, he could be said to be initiating a judicial proceeding as opposed to a civil action. Therefore the word proceeding has a meaning independent of "civil action" without requiring that we expand the statute to encompass administrative proceedings. Nor do we find the Supreme Court's opinion in *New York Gaslight Club, Inc. v. Carey*, 48 U.S.L.W. 4645 (June 9, 1980) controlling in this case. *New York Gaslight Club* concerned section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k) (1976), a statute with a different legislative purpose and history. It also did not involve an attempt to recover attorneys' fees from the United States government.

We therefore agree with the other courts that have considered this question and conclude that the phrase "civil action or proceeding" includes only judicial proceedings and not administrative actions. *See, e.g., Kipperman v. Commissioner*, No. 77-3174 (9th Cir. June 26, 1980); *Key Buick Co. v. Commissioner*, 613 F.2d 1306 (5th Cir. 1980).

B.

The appellant also argues that, even if administrative proceedings such as the issuance of a deficiency notice are not within the meaning of the phrase "civil action or proceeding" in section 1988, she nevertheless is entitled to claim attorneys' fees despite her status as plaintiff because the unique defensive nature of tax liti-

gation makes the status of the taxpayer as plaintiff or defendant irrelevant. According to this argument, the taxpayer is always defending against the government in tax litigation even though he or she generally must initiate the judicial proceeding.[1] Because the taxpayer is rarely the defendant in a judicial proceeding, the appellant argues that requiring the United States to be the named plaintiff renders the statute virtually meaningless.

We recognize that there are few cases in which the United States is the plaintiff, but we conclude that the language of the statute, as well as its legislative history, reflects that Congress only authorized attorneys' fees against the government in these limited situations. We refuse to ignore the common meaning of "by or on behalf of" on the assumption that Congress misunderstood the nature of tax litigation when it passed this Act. Nothing in the debates surrounding the passage of the Allen amendment indicates that Congress intended to allow attorneys' fees in cases other than those in which the United States was the plaintiff. In fact, the legislators referred to the status of the United States as plaintiff when enumerating those situations in which an award of attorneys' fees would be appropriate. *See, e.g.*, 122 Cong. Rec. 33,312 (1976) (remarks of Sen. Tunney); *id.* at 33,312-13 (remarks of Sen. Kennedy); *id.* at 35,122 (remarks of Rep. Drinan). *But see* 123 Cong. Rec. 1281-82 (1977) (remarks of Sen. Allen after the Act had been passed).

Although we sympathize with the appellant's contention that this reading of the statute will result in very few attorneys' fees awards to prevailing taxpayers, we note that her argument proves too much. If we were to

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1. When the government sends a deficiency notice, the taxpayer may either pay the disputed amount and file for a refund in a district court or the Court of Claims, or elect not to pay the tax and petition the Tax Court to contest the deficiency. In each of these judicial proceedings, the taxpayer is the plaintiff or moving party. These suits comprise the vast majority of tax litigation.

hold that the nature of tax litigation renders the status of the taxpayer as plaintiff or defendant irrelevant, the government would be subject to an attorneys' fees claim every time a taxpayer prevailed in a dispute with the government over the amount of taxes due. We cannot reach such a result without a firm indication of congressional intent.[2] Virtually all other courts that have considered this question have held that the United States must be the named plaintiff in order for the taxpayer to claim attorneys' fees. *See, e.g., Kipperman v. Commissioner, supra; Patzkowski v. United States, supra. But see Levno v. United States,* 440 F. Supp. 8 (D.Mont. 1977) (basis of finding not explained).

III.

Because this was not a judicial proceeding initiated by the United States, the plaintiff's motion for attorneys' fees will be denied. Given our disposition of these issues, we need not reach the question whether the taxpayer must show bad faith in order to recover attorneys' fees.

A True Copy:

Teste:

A TRUE COPY:
M. Elizabeth Ferguson
M. ELIZABETH FERGUSON,
Chief Deputy Clerk

Clerk of the United States Court of Appeals for the Third Circuit

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2. We note that S.1444, a bill currently pending in Congress, would allow a taxpayer to recover attorneys' fees regardless of his status as plaintiff or defendant when the government acts "unreasonably."

(A.O. U. S. Courts, The Legal Intelligencer, Phila., Pa.)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-2033

LINDA M. LIBERI TONER,
Appellant

vs.

COMMISSIONER OF INTERNAL REVENUE

(T.C. Docket No. 0555-76)

ON APPELLANT'S MOTION FOR ATTORNEYS' FEES

Present: SEITZ, Chief Judge, ROSENN, Circuit Judge and SHAPIRO*, District Judge

ORDER

It appearing that appellant having filed a Motion for Attorneys' fees pursuant to 42 U.S.C. § 1988 together with supporting memoranda; and

It further appearing that appellee having filed responses thereto, and

It further appearing that the said documents having been submitted to the Court pursuant to Third Circuit Rule 12(6),

It is hereby ordered and adjudged that the said Motion for Attorneys; fees be,and the same is hereby denied, all in accordance with the opinion of this Court.

ATTEST:

Betty J. Robinson
Deputy Clerk

Dated: September 3, 1980

*Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit has been made on opposing counsel on this _____st day of December, 1980, by mailing a copies thereof in an envelope, with postage prepaid, addressed to:

M. Carr Ferguson, Esquire
Gilbert S. Rothenberg, Esquire
Assistant Attorney General,
Tax Division
United States Department of Justice
Washington, D. C. 20530

Chief Counsel
Internal Revenue Service
Washington, D. C. 20224

December ____, 1980

_____
One of the Attorneys for
Petitioner